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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:

KATHLEEN KELLOGG-TAXE,

Debtor.

Case No. 2:12-bk-51208-RK

Chapter 7

Adv. No. 2:15-ap-01615-RK

CAROLYN A. DYE, Chapter 7 Trustee of
the Estate of KATHLEEN KELLOGG-
TAXE,

Plaintiff,

vs.

RICHARD TAXE, an individual, and
DOES 1-20, inclusive

Defendants.

**MEMORANDUM DECISION AFTER
TRIAL ON PLAINTIFF'S COMPLAINT
FOR TURNOVER AND ACCOUNTING
PURSUANT TO 11 U.S.C. §§ 105, 541,
542**

The above-captioned adversary proceeding on the complaint of Plaintiff Carolyn A. Dye ("Plaintiff"), Chapter 7 Trustee, asserting a claim for turnover and accounting of property of the estate against Defendant Richard Taxe ("Defendant"), the husband of Debtor Kathleen Kellogg-Taxe ("Debtor"), pursuant to 11 U.S.C. §§ 105, 541, 542 came on for trial before the undersigned United States Bankruptcy Judge on February 10,

1 2017. Christian T. Kim, of Dumas & Kim, APC, appeared on behalf of Plaintiff.

2 Defendant Richard Taxe appeared for himself.

3 On February 23, 2017, after trial and through her counsel of record, Plaintiff
4 lodged her proposed findings of fact and conclusions of law, Electronic Case Filing
5 Number ("ECF") 54. On March 6, 2017, Defendant lodged his proposed findings of fact
6 and conclusions of law, ECF 55. On April 14, 2017, Plaintiff subsequently lodged
7 amended proposed findings of fact and conclusions of law, ECF 61. The court heard
8 closing arguments on February 10, 2017, and afterwards, took the matter under
9 submission.

10 Having considered the testimony of the witnesses at trial, the documentary
11 evidence received at trial, and the record before the court, the court hereby makes the
12 following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal
13 Rules of Bankruptcy Procedure and Rule 52 of the Federal Rules of Civil Procedure.

14 **FACTS**

15 On December 18, 2012, Debtor commenced the underlying bankruptcy case by
16 filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C.,
17 2:12-bk-51208-RK ("Main Case"), ECF 1. On January 24, 2013, the case was converted
18 to one under Chapter 7 of the Bankruptcy Code, with Plaintiff appointed as Chapter 7
19 trustee. Main Case, ECF 18 and 20. On November 5, 2013, Plaintiff filed a Motion for
20 Sale of the Vestone Way Property free and clear of liens and interest and subject to
21 overbids ("Motion for Sale"). Main Case, ECF 151. As Debtor testified at trial, the
22 Vestone Way Property was her sole and separate property and was a gift from
23 Defendant's parents to her. *Trial Transcript 23:1-25, 24:1-13; see also, Defendant's*
24 *Proposed Findings of Fact and Conclusions of Law, Finding of Fact No. 1*, ECF 55,
25 lodged on March 6, 2017 ("Kathleen Kellogg-Taxe owned the home ata [sic] 10535
26 Vestone Way, Los Angeles, California 90077 as her sole and separate property.").

1 On April 21, 2014, the court entered an order granting, in part, and denying, in
2 part, the Motion for Sale, with the Order for Sale authorizing the sale of the Vestone Way
3 Property for a total sale price of \$2,500,000. *Order Granting in Part, and Denying in Part,*
4 *the Motion for Sale, Plaintiff's Trial Exhibit 1, ¶ 3.* The Order for Sale also provided that
5 the sale proceeds, including Debtor's homestead exemption, were to be held in escrow
6 pending further court order. *Id.* at ¶ 14. On June 20, 2014, escrow closed on the sale of
7 the Vestone Way Property, with Debtor's homestead exemption of \$175,000 set aside
8 pending further court order in accordance with the Order for Sale. *Seller's Final Closing*
9 *Statement, Plaintiff's Trial Exhibit 2.* Plaintiff then filed a motion authorizing the release of
10 the sale proceeds from the sale of the Vestone Way Property on August 6, 2014 ("Motion
11 Authorizing Release"), including payment of the \$175,000 homestead exemption to
12 Debtor. *Motion Authorizing Release, Plaintiff's Trial Exhibit 3.* In the Motion Authorizing
13 Release, Plaintiff reserved her rights to recover the \$175,000 homestead exemption if
14 Debtor failed to invest the homestead proceeds within 6 months in accordance with state
15 law. *Id.* at 11, lines 19-21.

16 On September 5, 2014, the court entered an order granting the Motion Authorizing
17 Release. *Order Granting the Motion Authorizing Release, Plaintiff's Trial Exhibit 4.* On
18 September 15, 2014, the escrow company holding Debtor's homestead proceeds of
19 \$175,000 prepared a written check for Debtor, which was cashed by Debtor. *Copy of the*
20 *Canceled Check Received from A&A Escrow, Plaintiff's Trial Exhibit 5.* On October 3,
21 2014, Debtor deposited \$150,000 of the homestead proceeds in her City National Bank
22 Account and did not deposit the remaining \$25,000 of homestead proceeds into her bank
23 account, which she kept for herself. *Deposit Slip for \$150,000, Plaintiff's Trial Exhibit 7;*
24 *Trial Transcript [page]18:[lines]13-25, 19:1-17.*

1 Following the deposit of \$150,000 in homestead proceeds on October 3, 2014,
2 Debtor wrote the following checks from her bank account:

- 3 • October 29, 2014—Check payable to Debtor in the amount of \$8,300
4 (Check 101), with “Living Expenses” written on the memo line of the
5 check stub;
- 6 • November 20, 2014—Check payable to Debtor in the amount of
7 \$5,000 (Check 102), with “Living Expenses” written on the memo line
8 of the check stub;
- 9 • February 17, 2015—Check payable to Debtor in the amount of
10 \$30,000 (Check 103), with “living expenses” written on the memo line
11 of the check stub;
- 12 • February 27, 2015—Check payable to Debtor in the amount of
13 \$30,000 (Check 104), with “living expenses” written on the memo line
14 of the check stub;
- 15 • March 3, 2015—Check payable to Defendant in the amount of
16 \$30,010 (Check 105), with “loan” written on the memo line on the
17 check stub and \$10.00 “for cashiers check”;
- 18 • March 3, 2015—Check payable to Debtor in the amount of \$20,000
19 (Check 106) with “living expenses” written on the memo line on the
20 check stub;
- 21 • March 10, 2015—Check payable to Defendant in the amount of
22 \$38,000 (Check 107), with “loan” written on the check¹;

24 ¹ The court notes that there are discrepancies between this particular check stub and
25 what appears to be the actual check. The actual check is written out to Defendant, not
26 Debtor, in the amount of \$38,000, not \$20,000. Additionally, “Re: Loan” is written on the
27 check’s memo line, not “living expenses.” *Compare* City National Bank Statements,
28 Canceled Checks, Plaintiff’s Trial Exhibit 9 at 9 *with* Check Stubs of the Debtor, Plaintiff’s
Trial Exhibit 10.

1 • October 1, 2015—Check payable to Defendant in the amount of
2 \$2,000 (Check 108), with the memo line left blank on the check stub.
3 *City National Bank Statements, Canceled Checks, Plaintiff's Trial Exhibit 9; Check Stubs*
4 *of the Debtor, Plaintiff's Trial Exhibit 10.*

5 At trial, Debtor testified that she was advised by her attorney, Gregory M. Salvato,
6 of Salvato Law Offices, in writing on September 23, 2014, that Plaintiff had authority to
7 recover the homestead proceeds if the money was not reinvested in another homestead
8 within six months, and produced a copy of a letter from Gregory M. Salvato to this effect.
9 *Trial Transcript 38:9-25, 39:1-7.* This writing, the letter from Gregory M. Salvato to
10 Debtor, is *Plaintiff's Trial Exhibit 13*. This letter was addressed to Debtor and dated
11 September 23, 2014, and stated that "Your [Debtor's] signature below will acknowledge
12 receipt of the enclosed check. . .representing payment by the Chapter 7 Trustee to you
13 [Debtor] for your homestead exemption in the amount of \$175,000, derived from the sale
14 of the Vestone Property. As we have discussed, the Trustee has the power to recover
15 the \$175,000 if that amount is not reinvested in the purchase of a replacement home
16 within six months. CCP Section 704.720. That is, the exemption is lost (and the amount
17 may be seized by levy) if not applied to another property within that time period." *Letter*
18 *from Gregory Salvato dated September 23, 2014, Plaintiff's Trial Exhibit 13.* This letter
19 was signed by Debtor. *Id.* This evidence indicates that Debtor received the homestead
20 proceeds from the escrow of the sale of the Vestone Way Property at least by September
21 23, 2014, which the court so finds.

22 At trial, Debtor also testified that she gave Defendant funds from the homestead
23 proceeds to pay for living expenses and bills. *Trial Transcript 18:16-25, 19:1-8, 18-25,*
24 *20:1-25, 21:1-11, 25:13-15.* Ultimately, none of the homestead proceeds distributed to
25 Debtor were paid over to Plaintiff when the six-month reinvestment period ended. *Trial*
26 *Transcript 48:2-16.* At trial, Debtor testified that she took out \$148,010 in cash from her
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1 bank account where she deposited most of the homestead proceedings during the time
2 period from February 2015 to March 2015. *Trial Transcript 40:18-22*.

3 On November 20, 2015, Plaintiff commenced the instant adversary proceeding by
4 filing her complaint for turnover and accounting in which Plaintiff alleges that the
5 homestead proceeds are part of Debtor's bankruptcy estate pursuant to 11 U.S.C. § 541
6 and *Wolfe v. Jacobson (In re Jacobson)*, 676 F.3d 1193 (9th Cir. 2012) because these
7 homestead proceeds were not timely reinvested as required by applicable state law.
8 According to Plaintiff, Defendant was in possession, custody, or control, of Debtor's
9 homestead proceeds and should be ordered to turnover and/or account for these
10 proceeds under 11 U.S.C. § 542(a). As set forth herein, the court finds in favor of Plaintiff
11 in part and Defendant in part.

12 **DISCUSSION**

13 **Homestead Exemption Proceeds**

14 "California, like many states, gives debtors an exemption for their 'principal
15 dwelling' or 'homestead.'" *In re Jacobson*, 676 F.3d at 1198, *citing* California Code of
16 Civil Procedure §§ 704.710(c), 704.720(a). "The debtor's share of the proceeds are not
17 fully exempt either. If the debtor does not reinvest his proceeds in a new homestead
18 within six months of receipt, they lose their exempt status." *Id.*, *citing* California Code of
19 Civil Procedure § 704.720(b).

20 It is undisputed that Debtor received the homestead exemption proceeds on
21 September 23, 2014 and did not reinvest the proceeds in a new homestead by the
22 deadline of 6 months of receipt on March 23, 2015. *Letter from Gregory Salvato dated*
23 *September 23, 2014, Plaintiff's Trial Exhibit 13; Trial Transcript 40:6-22*. But Debtor's
24 failure to reinvest the proceeds in a new homestead does not necessarily subject
25 Defendant to liability. As noted previously, based on Debtor's trial testimony, which is
26 undisputed, the Vestone Way Property was a gift to her from Defendant's parents and
27 was her sole and separate property. *Trial Transcript 23:1-25, 24:1-13*. Accordingly,
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1 because the Vestone Way Property was Debtor's separate property, Defendant did not
2 have any interest in Debtor's homestead proceeds and thus personally had no duty to
3 reinvest these funds. Although Defendant had no personal duty to reinvest the
4 homestead proceeds, for the reasons discussed below, the court finds that Plaintiff has
5 met the requirements under 11 U.S.C. § 542(a) as to Defendant with respect to \$70,010
6 in the homestead proceeds.

7 **Turnover of Homestead Proceeds**

8 11 U.S.C. § 542(a) provides that "[e]xcept as provided in subsection (c) or (d) of
9 this section, an entity, other than a custodian, in possession, custody or control, during
10 the case, of property that the trustee may use, sell, or lease under section 363 of this title,
11 or that the debtor may exempt under section 522 of this title, shall deliver to the trustee,
12 and account for, such property or the value of such property, unless such property is of
13 inconsequential value or benefit to the estate."

14 "A number of prerequisites must be satisfied before turnover can be ordered
15 pursuant to [Bankruptcy] Code § 542(a). First, the section applies only to 'entities' but
16 explicitly excludes custodians. Code § 101(15) defines 'entity' as any person, estate,
17 trust, governmental unit, or U.S. Trustee. Second, the property must be property of the
18 estate as defined in Code § 541. Third, the property must be of a type that the trustee
19 can use, sell, or lease under Code § 363 or that the debtor can exempt under code §
20 522." Norton, *Norton Bankruptcy Law and Practice*, § 62:3 (3d ed. online July 2017
21 update), *citing inter alia*, 11 U.S.C. § 542(a).

22 **Entity (First Prerequisite for Turnover)**

23 Because Defendant is a person, the court finds that Plaintiff has proven Defendant
24 is an entity under 11 U.S.C. § 101(15) for purposes of 11 U.S.C. § 542(a), therefore
25 satisfying the first prerequisite for turnover.

Property of the Estate (Second Prerequisite for Turnover)

The property at issue here is the \$175,000 in homestead proceeds that Plaintiff alleges were not reinvested by Debtor, the homestead owner, in a new homestead. As set forth herein, controlling Ninth Circuit precedent interpreting California exemption law provides that a debtor must reinvest homestead sales proceeds in a new homestead within six months of receipt. *In re Jacobson*, 676 F.3d at 1198, *citing*, California Code of Civil Procedure § 704.720(b). If a debtor failed to reinvest the homestead proceeds in a new homestead, the proceeds are no longer exempt and are property of the bankruptcy estate. *Id.*

For the reasons set forth below, the court finds that the second prerequisite for turnover by Defendant is met with respect to \$70,010 of the homestead proceeds.

As noted earlier, in order for 11 U.S.C. § 542(a) to apply, the property at issue must have been property of the estate when Defendant had possession of such property. *In re Lyle*, 324 B.R. 128, 130 (Bankr. N.D. Cal. 2005) (“The crucial first question raised by a turnover motion is whether the property to be turned over is property of the estate”). “A Chapter 7 bankruptcy petition creates an estate to satisfy creditors’ claims. The estate consists of ‘all legal or equitable interests of the debtor in property’ when the petition is filed. 11 U.S.C. § 541(a)(1). A debtor may, however, exclude property from the estate through various exemptions. Section 522 of the Bankruptcy Code provides a default list of exemptions but allows states to opt out and define their own exemptions. 11 U.S.C. §§ 522(b)(2), 522(b)(3)(A), 522(d). California has opted out of the federal exemption scheme and limited Chapter 7 petitioners to the exemptions debtors may claim in non-bankruptcy cases.” *In re Jacobson*, 676 F.3d at 1198. “The debtor’s share of the proceeds are not fully exempt either. If the debtor does not reinvest his proceeds in a new homestead within six months *of receipt*, they lose their exempt status.” *Id.*

(emphasis added); *see also, England v. Golden (In re Golden)*, 789 F.2d 698, 700 (9th Cir. 1986) (“Applying California law, we therefore hold that when the debtor fails to

1 reinvest homestead proceeds within a period of six months *in which the debtor has*
2 *control of those proceeds*, the proceeds should revert to the trustee.”)(emphasis added).

3 On September 15, 2014, the escrow company holding Debtor’s homestead
4 proceeds prepared a check written out to Debtor which she endorsed to get the funds.
5 *Copy of the Canceled Check Received from A&A Escrow, Plaintiff’s Trial Exhibit 5.* On
6 September 23, 2014, Debtor signed a letter from her attorney Gregory Salvato in which
7 she acknowledged receipt of the homestead proceeds and the warning that the
8 bankruptcy trustee has the power to recover the homestead proceeds if the amount was
9 not reinvested in a replacement home within six month. *Letter from Gregory M. Salvato*
10 *to Debtor dated September 23, 2014, Plaintiff’s Trial Exhibit 13.* Under applicable Ninth
11 Circuit precedent, the homestead proceeds were exempt and not property of the estate
12 for the reinvestment period of six months under California exemption law. *In re Golden*,
13 789 F.2d at 700; *In re Jacobson*, 676 F.3d at 1198, *citing*, California Code of Civil
14 Procedure § 704.720. Although the check from the escrow company to Debtor was
15 written and dated on September 15, 2014, the record is unclear as to the exact date of
16 receipt of the checks representing the funds by Debtor, that is, when she or her
17 representative, i.e., her attorney, actually received and had control over the check
18 representing the homestead proceeds, but the evidence indicates that she had actual
19 receipt and control over the funds by September 23, 2014 when Debtor signed the letter
20 from her attorney acknowledging receipt of the funds. *See In re Golden*, 789 F.2d at 700;
21 *In re Jacobson*, 676 F.3d 1198. Thus, the court finds that the date of Debtor’s receipt of
22 the homestead proceeds was September 23, 2014, and thus, the funds were exempt and
23 not estate property from September 23, 2014 to March 23, 2015, six months after receipt.
24 Any remaining funds not reinvested in a new homestead of Debtor’s during this six month
25 period became property of the bankruptcy estate on March 24, 2015.

26 “To support a cause of action for turnover, the trustee has the burden of proof, by
27 a preponderance of the evidence. . . .” 5 Resnick and Sommer, *Collier on Bankruptcy*, ¶

1 542.02 at 542-9 (16th ed. 2013); *see also*, *Gottlieb v. Bossio & Associates (In re Labib)*,
2 2013 WL 5934326, 2013 Bankr. LEXIS 4661, slip op. at *4 (Bankr. C.D. Cal. 2013). In
3 determining Defendant's liability for turnover based on reversion of the homestead
4 proceeds back to the bankruptcy estate upon the lapse of the 6 month reinvestment
5 period, the court will look to the evidence of the dates that Defendant received the
6 homestead exemption proceeds and the amounts of homestead proceeds that he
7 received. If the homestead proceeds were received close in time to the expiration of the
8 homestead proceeds reinvestment period, and the amounts are so substantial that it is
9 more likely than not the proceeds were not spent, absent sufficient contrary evidence,
10 then the court may infer and find that the homestead proceeds are estate property
11 subject to turnover by Defendant.

12 Plaintiff relies on the following evidence in support that all of the \$175,000 in
13 homestead proceeds became property of the bankruptcy estate: statements made by
14 Debtor and Defendant in their trial and other testimony, Debtor's bank records, including
15 statements, canceled checks and check stubs, and living expense estimates from her
16 and Defendant.

17 At trial, Debtor testified that she did not deposit all of the \$175,000 in homestead
18 proceeds, but instead retained \$25,000 for the purpose of paying rent to Defendant's
19 brother. *Trial Transcript 19:5-17, 44:7-11*. Debtor further testified that she withdrew
20 \$148,010 in cash from her bank account where she deposited most of the homestead
21 proceeds during the time period of February 2015 to March 2015. *Trial Transcript 40:18-*
22 *22*. Debtor's Canceled Checks 103, 104, 105, 106, 107 confirm this fact. *City National*
23 *Bank Statements, Canceled Checks, Plaintiff's Trial Exhibit 9 at 7-9*. According to Debtor
24 in her trial testimony, she would write herself a check and give Defendant a portion of the
25 homestead proceeds in cash to pay for living expenses. *Trial Transcript 33:22-25, 34:1-*
26 *11*.

1 The evidence shows that Debtor wrote eight checks on her bank account where
2 the homestead proceeds were deposited in the time period from October 29, 2014 to
3 October 1, 2015. *City National Bank Statements, Canceled Checks, Plaintiff's Trial*
4 *Exhibit 9 at 1-9; Check Stubs of the Debtor, Plaintiff's Trial Exhibit 10.*

5 One of these checks, Check 108, was written out payable to Defendant after the
6 six month reinvestment period expired on March 23, 2015. *Check Stubs of the Debtor,*
7 *Plaintiff's Trial Exhibit 10.* On October 1, 2015, Debtor wrote Check 108 out payable to
8 Defendant in the amount of \$2,000. *Id.; Trial Transcript 41:15-25, 42:1.* Based on this
9 evidence, the court finds that this amount of \$2,000 of the homestead proceeds remained
10 in existence as of the expiration of the reinvestment period on March 23, 2015 was
11 property of the bankruptcy estate, which was disbursed to Defendant on October 1, 2015,
12 and is subject to turnover by him.

13 On October 29, 2014, Debtor wrote Check 101 out payable to herself in the
14 amount of \$8,300 for "living expenses." *City National Bank Statements, Canceled*
15 *Checks, Plaintiff's Trial Exhibit 9 at 2; Check Stubs of the Debtor, Plaintiff's Trial Exhibit*
16 *10.* At trial, Debtor testified that possibly half of Check 101 proceeds were given to
17 Defendant, but that this figure was just a "guesstimate." *Trial Transcript 24:15-25, 25:1-2.*
18 At trial, Debtor stated "...When I gave him cash to go down to the DWP or the gas
19 company or what other – what other bills we had, that's what he paid—that's when I'd
20 give him the cash." *Trial Transcript 30:5-10; see also Trial Transcript 33:22-25, 34:1-6* ("I
21 would give [Defendant] money and he would pay the bills. . . ."). Because Debtor wrote
22 out Check 101 to herself, and not Defendant, the check itself does not establish the
23 amount of homestead proceeds given by her to Defendant.

24 As to the amount of living expenses that Debtor and Defendant had during the
25 relevant time period from September 2014 to March 2015, Plaintiff offered into evidence
26 Debtor's and Defendant's own estimate of average living expenses for him and Debtor,
27 which he prepared totaling \$4,954. *Monthly Living Expense List, Plaintiff's Trial Exhibit*
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11; *Trial Transcript* 42:2-25, 43:1-25. While Defendant and Debtor did testify that the average living expenses in this estimate were not entirely accurate, their testimony was conflicting at trial. According to Debtor, the living expense estimates were “overestimated.” *Trial Transcript* 42:2-9. Defendant testified that for the period of July 2014 to May 2015, his living expenses “were at least 2—or \$3,000 more than” the estimated \$4,954. *Trial Transcript* 59:14-23. The court finds that the estimate of \$4,954 in the living expenses for Debtor and Defendant as shown in the estimate prepared by Defendant offered into evidence by Plaintiff is plausible and credible and will use that figure to determine the reasonable average living expenses of Debtor and Defendant during the time period of September 2014 to March 2015.

Regardless of how much of the proceeds of Check 101 dated October 29, 2014 in the amount of \$8,300 that Debtor gave to Defendant to use for living expenses, given their average living expenses of \$4,954 per month and the lack of proximity in time to the reinvestment deadline of March 23, 2015, five months later, the court can and does reasonably infer that these funds were spent on their living expenses, and thus, did not exist as of the reinvestment deadline to revert to be property of the bankruptcy estate, and are not subject to turnover by Defendant. Therefore, the court finds that Plaintiff has not met her burden of proving by a preponderance of the evidence that Defendant is liable for turnover of the funds as to Check 101.

On November 20, 2014, Debtor wrote Check 102 out payable to herself in the amount of \$5,000 also for “living expenses”. *City National Bank Statements, Canceled Checks, Plaintiff’s Trial Exhibit 9 at 4; Check Stubs of the Debtor, Plaintiff’s Trial Exhibit 10*. Debtor testified that a portion of the Check 102 proceeds were given to Defendant, but Debtor did not provide an exact figure in her trial testimony. *Trial Transcript* 25:5-15. Because Debtor wrote out Check 102 to herself, and not Defendant, the check itself does not establish the amount of homestead proceeds given by her to Defendant.

1 Regardless of how much of the proceeds of Check 102 dated November 20, 2014
2 in the amount of \$5,000 that Debtor gave to Defendant to use for living expenses, given
3 their average living expenses of \$4,954 per month and the lack of proximity in time to the
4 reinvestment deadline of March 23, 2015, four months later, the court can and does
5 reasonably infer that these funds were spent on their living expenses, and thus, did not
6 exist as of the reinvestment deadline to revert to be property of the bankruptcy estate,
7 and are not subject to turnover by Defendant. Therefore, the court finds that Plaintiff has
8 not met her burden of proving by a preponderance of the evidence that Defendant is
9 liable for turnover of the funds as to Check 102.

10 On February 11, 2015 and February 27, 2015, Debtor wrote out Checks 103 and
11 104 payable to herself both in the amount of \$30,000 for "living expenses". *City National*
12 *Bank Statements, Canceled Checks, Plaintiff's Trial Exhibit 9 at 7; Check Stubs of the*
13 *Debtor, Plaintiff's Trial Exhibit 10.* Debtor testified at trial that portions of the funds from
14 Checks 103 and 104 were given to Defendant, but again failed to specify the amounts.
15 *Trial Transcript 27:2-25, 28:1-25, 29:1-25, 30:1-4.* Because Debtor wrote out Checks 103
16 and 104 to herself, and not Defendant, the checks themselves do not establish the
17 amounts of homestead proceeds given by her to Defendant. Plaintiff has not offered any
18 bank statements of Defendant or other evidence demonstrating the exact amounts
19 Defendant received from these checks, which apparently leaves the only direct evidence
20 of funds from these checks given by Debtor to Defendant to be Debtor's testimony, which
21 is not very helpful.

22 It is possible that Defendant received a portion of these check proceeds
23 representing homestead proceeds so substantial that the court could find by a
24 preponderance of the evidence that Defendant did not spent the entirety of these funds
25 by the time the exemption period expired, and thus, at least some of these homestead
26 proceeds reverted to become property of the bankruptcy estate. But it is also possible
27 that Defendant received very little of these check proceeds, which could support an
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1 inference that Defendant was able to, and did, spend these proceeds before they
2 became estate property upon expiration of the reinvestment period. Debtor's trial
3 testimony that she only gave him money to pay living expenses as needed appears to
4 support the latter possibility. However, Debtor's testimony is not very convincing that she
5 only gave Defendant enough to pay necessary living expenses as indicated by the
6 discussion of two of the remaining three checks, Checks 105 and 107, below. But as to
7 Checks 103 and 104, the evidence is inconclusive as to how much of the check proceeds
8 Defendant was given by Debtor and as to how much of these funds were not spent by the
9 reinvestment deadline of March 23, 2015, even though these checks were dated and
10 issued about four to six weeks before the deadline. Because of these uncertainties, the
11 court finds that Plaintiff has not met her burden of proving by a preponderance of the
12 evidence that Defendant is liable for turnover of the funds as to Checks 103 and 104.

13 The court next looks to the remaining checks written out by Debtor from her bank
14 account where the homestead proceeds were deposited, Checks 105, 106 and 107.

15 On March 3, 2015, Debtor wrote Check 106 out payable to herself in the amount
16 of \$20,000 for "living expenses." *City National Bank Statements, Canceled Checks,*
17 *Plaintiff's Trial Exhibit 9 at 9.* At trial, Debtor testified that none of the proceeds from
18 Check 106 were given to Defendant. *Trial Transcript 37:18-25, 38:1-8.* The court finds
19 this testimony to be credible. Plaintiff does not offer any evidence to contradict this
20 testimony. Based on this evidence, the court finds that Defendant had not received
21 possession of the funds in this amount of \$20,000, and thus, he has no liability for
22 turnover of these funds as he never possessed the funds, a necessary requirement for
23 turnover under 11 U.S.C. 542(a), regardless of whether the funds were in existence as of
24 March 23, 2015, the deadline for reinvestment of the homestead proceeds, and became
25 property of the bankruptcy estate on March 24, 2015 after the reinvestment period
26 expired.

1 On March 3, 2015, Debtor wrote Check 105 out payable to Defendant in the
2 amount of \$30,010, with "loan" written on the memo line. *City National Bank Statements,*
3 *Canceled Checks, Plaintiff's Trial Exhibit 9 at 9.* The check register stub for Check 105
4 stated: "Pay to Richard Taxe" in the amount of \$30,010 with "loan" written on the memo
5 line with a further notation for "ACCT", "10.00 for cashiers check." *Check Stubs of the*
6 *Debtor, Plaintiff's Trial Exhibit 10.* Defendant proposed a finding of fact that "Check No.
7 105 was given to me to purchase a Cashier's Check in favor of Kathleen Kellogg-Taxe,
8 her check ledger supports this fact." *Defendant's Proposed Findings of Fact and*
9 *Conclusions of Law, Finding of Fact No. 3, ECF 55.* Defendant only cites to Debtor's
10 check ledger or register, and no other evidence was cited or offered at trial to corroborate
11 his version of the facts that he used the money he got from Check 105 to purchase a
12 cashier's check. *Id.* That is, Defendant did not offer at trial any documentary evidence of
13 the purchase of a cashier's check, such as a properly authenticated copy of the cashier's
14 check or a cashier's check purchase receipt. In any event, the proposed finding of fact
15 admits that Defendant received the funds from Check 105. The court finds that this
16 evidence shows that because Check 105 was written out payable to Defendant, he
17 received the amount shown on the face of the checks since the cancelled check shows
18 that payment of the check was negotiated. Thus, Plaintiff has made a prima facie
19 evidentiary showing that Defendant received the funds shown on Check 105, which was
20 from Debtor's homestead proceeds, and had possession of the funds when the check
21 was negotiated shortly after issuance on March 3, 2015, only three weeks before the
22 reinvestment deadline of March 23, 2015.

23 On March 10, 2015, Debtor wrote Check 107 out payable to Defendant in the
24 amount of \$38,000, with "Loan" written on the memo line. *City National Bank*
25 *Statements, Canceled Checks, Plaintiff's Trial Exhibit 9 at 9; Check Stubs of the Debtor,*
26 *Plaintiff's Trial Exhibit 10.* The check stub for Check 107 is inconsistent with the check
27 itself because the check stub indicates that the check was written out payable to Debtor
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1 on March 10, 2015 in the amount of \$20,000 for “living expenses.” *Id.* The actual
2 cancelled check shows that Check 107 is written out payable to Defendant, not Debtor,
3 and is written in the amount of \$38,000, not \$20,000. *Id.* Additionally, the memo line on
4 the cancelled check states “Re: Loan,” while the memo line on the check stub states
5 “living expenses.” *Id.* Accordingly, the court finds that the payee of Check 107 based on
6 the actual cancelled check was Defendant and the actual amount of the check as shown
7 on the cancelled check was \$38,000. The court further finds that this evidence shows
8 that because Check 107 was written out payable to Defendant, he received the amount
9 shown on the face of the checks since the cancelled check and the account bank
10 statement show that payment of the check was negotiated. Thus, Plaintiff has made a
11 prima facie evidentiary showing that Defendant received the funds shown on this check,
12 which was from Debtor’s homestead proceeds, and had possession of the funds when
13 the check was negotiated shortly after issuance on March 10, 2015, only two weeks
14 before the reinvestment deadline of March 23, 2015.

15 In opposition to this prima facie showing, Defendant made an argument in a
16 proposed finding of fact that “Check No. 107 was made out to Richard Taxe. If it was
17 cashed or if I purchased a Cashier’s Check in her name I gave whatever money to her.”
18 *Defendant’s Proposed Findings of Fact and Conclusions of Law, Finding of Fact No. 5,*
19 *ECF 55.* First, this proposed finding of fact is equivocally worded as a statement of a
20 hypothetical fact (i.e., “if I cashed the check, I gave the money back to her”), and not as a
21 statement of an actual fact, which is cause for suspicion of its veracity because this
22 explanation is evasive. Second, Defendant does not cite any evidence to support his
23 version of the facts that he used the money he got from Check 105 to purchase a
24 cashier’s check and gave the money back to Defendant. It really does not make any
25 sense that Debtor wrote out a check to Defendant to buy her a cashier’s check and to
26 give her cash back.

1 At trial, Debtor testified that the proceeds from Checks 105 and 107 were used for
2 living expenses. *Trial Transcript 36:24-25, 37:1-17, 39:17-25, 40:1-17*. However, the
3 court finds Debtor's testimony on this point is not credible for the reasons set forth below.
4 First, the amounts of Checks 105 and 107 total \$68,010. Although Debtor testified that
5 these funds were spent entirely on living expenses of her and Defendant, it seems highly
6 improbable that they incurred living expenses that high. Absent emergency
7 expenditures, it seems only the most extravagant of lifestyles require living expenses of
8 \$68,010 for a single month. Defendant has not provided any bills, bank statements, or
9 receipts to corroborate his and Debtor's testimony that he spent the 68,010 on living
10 expenses. Second, this amount is inconsistent with Debtor's and Defendant's own
11 estimate of their living expenses that he prepared, showing their monthly living expenses
12 to be \$4,954. *Monthly Living Expense List, Plaintiff's Trial Exhibit 11*. While Defendant
13 and Debtor did testify that this estimate of their living expenses on Plaintiff's Trial Exhibit
14 11 was not entirely accurate, their testimony was inconsistent. Debtor in her testimony
15 stated that the living expense estimates were "overestimated." *Trial Transcript 42:2-9*. In
16 contrast, Defendant testified that for the period of July 2014 to May 2015, his living
17 expenses "were at least 2—or \$3,000 more than" the estimated \$4,954. *Trial Transcript*
18 *59:14-23*. But even assuming Defendant's testimony is credible and his living expenses
19 actually total \$7,954, allowing for an increase of \$3,000, this adjusted figure still falls far
20 short of explaining the \$68,010 that he received and that was purportedly spent on living
21 expenses. Third, the court notes that Check 106 written by Debtor out payable to herself
22 in the amount of \$20,000 was also written the same day as Check 105, with "living
23 expenses" written on the memo line. This raises doubt about Debtor's testimony that
24 Check 105 in the amount of \$30,010 written on the same day was for living expenses
25 because Debtor also wrote out another check, Check 106, payable to herself, in the
26 amount of \$20,000 on the same day, March 3, 2015, with "living expenses" written on the
27 memo line. That is, if Debtor's account that Checks 105, 106 and 107 totaling \$88,010
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1 were used to pay monthly living expenses, then this would represent roughly 17 months
2 of monthly living expenses based on the \$4,954 per month estimate, which is not
3 credible. Since these checks were written out by Debtor shortly before the expiration of
4 the homestead proceeds reinvestment deadline of March 23, 2015, these check
5 disbursements strongly indicate Debtor's intent to get the homestead proceeds soon to
6 revert to being property of the bankruptcy estate out of her bank account and out of her
7 name. Fourth, Debtor also wrote out checks to herself during this time frame for the
8 express purpose of paying living expenses that were sufficient for that purpose. On
9 February 27, 2015, Debtor wrote a check to herself, Check 104, in the amount of \$30,000
10 for "living expenses." On March 3, 2015, Debtor wrote another check to herself, Check
11 106, also for "living expenses" in the amount of \$20,000. Each check was written less
12 than a month before the homestead proceeds reinvestment period expired. Based on
13 Debtor's estimated monthly living expenses, either check alone would have been
14 sufficient to cover several months of monthly living expenses for her and Defendant, and
15 together (i.e., \$50,000) would have covered 10 months of monthly living expenses at the
16 estimate of \$4,954 per month. Fifth, Debtor has testified that she earned approximately
17 \$28,000 in gross income from a part-time job. *Trial Transcript 45:1-10*. Debtor also
18 testified that both she and Defendant receive social security payments. *Trial Transcript*
19 *45:14-25*. These additional sources of income indicate that Defendant and Debtor had
20 other resources to defray their living expenses besides use of the homestead proceeds,
21 suggesting that the proceeds of Checks 105 and 107 were not needed, nor used, to pay
22 living expenses. Sixth, Checks 105 and 107 demonstrate an inconsistency with how
23 Debtor previously gave homestead proceeds to Defendant to pay for living expenses
24 based on the prior checks from her bank account where the homestead proceeds were
25 deposited. As previously discussed, for the period of October 29, 2014 to March 3, 2015,
26 Debtor wrote Checks 101, 102, 103, 104, and 106 out payable to herself and would then
27 give funds to Defendant to be used for living expenses. In contrast, Debtor wrote checks
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1 105 and 107 directly to Defendant, and these checks contained the word “loan” written on
2 the memo line. This inconsistency raises questions about Debtor’s intent in suddenly
3 deviating from a pattern of behavior she sustained over a period of 125 days, and at
4 roughly the same time, also writing out Check 106 payable to herself also for “living
5 expenses”. All of these circumstances are highly suspicious and suggest that the court
6 cannot take Debtor’s testimony at face value that she gave Defendant the funds through
7 Checks 105 and 107 representing the homestead proceeds of \$68,010 soon to revert to
8 property of the bankruptcy estate only to pay for their living expenses. For these
9 reasons, the court finds that Debtor’s testimony that she wrote Checks 105 and 107 in
10 the total amount of \$68,010 to Defendant for him to spend on their living expenses not to
11 be credible. Thus, these circumstances support the court’s finding that Plaintiff has
12 made a prima facie evidentiary showing that Defendant received the funds shown on
13 these checks, which were from Debtor’s homestead proceeds, and had possession of the
14 funds when the checks were negotiated shortly after issuance on March 3 and 10, 2015,
15 only two to three weeks before the reinvestment deadline of March 23, 2015.

16 Under California exemption law, any remaining homestead proceeds in existence
17 at the expiration of the 6 month reinvestment period became estate property after March
18 23, 2015. California Code of Civil Procedure § 704.720(b); *see also, In re Jacobson*,
19 676 F.3d at 1198.

20 Based on the foregoing, Plaintiff has shown by a preponderance of the evidence
21 that the funds from Debtor’s bank account representing her homestead proceeds
22 received by Defendant are property of the bankruptcy estate because Checks 105 and
23 107 paid to him were written less than a month before the exempt status of the
24 homestead proceeds expired on March 23, 2015, the evidence does not support that
25 these funds were spent on their living expenses before the expiration of the exempt
26 status of these funds, and thus, the court finds that \$68,010, the cumulative amount of
27 Checks 105 and 107, became property of the bankruptcy estate when the exempt status
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1 of these funds expired on March 23, 2015. Moreover, Plaintiff has also shown by a
2 preponderance of the evidence that the proceeds of \$2,000 from Check 108 paid to
3 Defendant after the expiration of exempt status are property of the estate. Thus, the
4 court finds that \$70,010 paid to Defendant satisfies the second prerequisite of turnover
5 that the property belongs to the bankruptcy estate. In sum, the court finds that two of the
6 three prerequisites for 11 U.S.C. § 542(a) have been met.

7 **Property Can be Claimed Exempt (Third Prerequisite for Turnover)**

8 The homestead proceeds are property that Debtor claimed exempt under
9 California state law, made applicable through 11 U.S.C. § 522(b), therefore satisfying the
10 third prerequisite for turnover. This fact is not in dispute because as discussed above,
11 Debtor was only paid from the escrow from the sale of the Vestone Way Property based
12 on her claim of a homestead exemption of \$175,000. With all three prerequisites for
13 turnover met for the \$70,010, the court next examines whether Defendant had
14 possession of this estate property.

15 **Possession, Custody or Control of Homestead Proceeds**

16 “Possession, custody or control of the property sought, or its identifiable proceeds,
17 is a necessary prerequisite for turnover.” 5 Resnick and Sommer, *Collier on Bankruptcy*,
18 ¶ 542.03[1] at 542-10 (16th ed. 2017); *see also, In re Labib*, 2013 WL 5934326, 2013
19 Bankr. LEXIS 4661, slip op. at *4 (Bankr. C.D. Cal. 2013), *citing Collier on Bankruptcy*, ¶
20 542.02 at 542-5. “To support a cause of action for turnover, the trustee has the burden of
21 proof, by a preponderance of the evidence. . . .” *Collier on Bankruptcy*, ¶ 542.02 at 542-
22 9; *see also, In re Labib*, 2013 WL 5934326, 2013 Bankr. LEXIS 4661, slip op. at *4
23 (Bankr. C.D. Cal. 2013) at *4. Under 11 U.S.C. § 542(a), Plaintiff must prove that
24 Defendant was in possession of the homestead proceeds as estate property in order to
25 prevail.

26 Plaintiff’s arguments that Defendant had possession of the funds is
27 straightforward, and as discussed herein, persuasive. First, the evidence indicates that
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1 Debtor wrote Checks 105 and 107 out to Defendant as the payee. *City National Bank*
2 *Statements, Canceled Checks, Plaintiff's Trial Exhibit 9 at 9; Check Stubs of the Debtor,*
3 *Plaintiff's Trial Exhibit 10.* Admittedly, Plaintiff has not offered evidence to show that the
4 proceeds of these checks were deposited into Defendant's bank accounts or that
5 Defendant endorsed these checks. The evidence is uncontroverted that these checks
6 were written out by Debtor to Defendant as payee. *City National Bank Statements,*
7 *Canceled Checks, Plaintiff's Trial Exhibit 9 at 9; Check Stubs of the Debtor, Plaintiff's*
8 *Trial Exhibit 10.* Debtor's bank account statements show that Checks 105 and 107 were
9 negotiated with the amounts of the checks being withdrawn from her bank account. *City*
10 *National Bank Statements, Canceled Checks, Plaintiff's Trial Exhibit 9 at 8.* Debtor has
11 testified that she wrote Check 108 out to Defendant and that these funds were used for
12 living expenses. *Trial Transcript 41:15-25, 42:1.* Plaintiff has also offered the check
13 register stub for Check 108 in support and a bank account statement for the month of
14 February 2016 indicating an ending balance of \$0. *Check Stubs of the Debtor, Plaintiff's*
15 *Trial Exhibit 10; City National Bank Statements, Canceled Checks, Plaintiff's Trial Exhibit*
16 *9 at 13.* Based on this evidence, the court infers and finds that Plaintiff has proven by a
17 preponderance that Check 108 was negotiated and Defendant had possession of the
18 \$2,000 of homestead proceeds from Check 108 after the homestead reinvestment period
19 expired. Defendant has not asserted that anyone else cashed the checks and retained
20 the funds. He does assert, however, that he used the funds to buy cashier's checks,
21 which he gave back to Debtor, but offered no evidence to corroborate this version of the
22 facts. Debtor testified at trial that she gave these checks to Defendant for living
23 expenses, so at least, this testimony shows who was the recipient of the checks, namely,
24 Defendant. Based on this evidence, the court finds that Defendant cashed the checks
25 and had possession of the proceeds.

26 At trial, Plaintiff asserted that the check stub for Check 105 was evidence that
27 Defendant had possession, custody, or control of the homestead proceeds because the
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1 check stub indicates “loan” on the memo line. *Trial Transcript 37:8-14*. On this point,
2 Debtor testified that she thought it was “her husband’s intent. . . that \$175,000” was
3 “basically [her] loan” and “[she] understood [Defendant] was going to. . . [be] paying
4 [Debtor] back for the loan” if he “made money.” *Trial Transcript 37:8-14*. In other words,
5 Debtor seems to assert that because the homestead proceeds given to Defendant were
6 a loan, Defendant was not in possession of the funds and should not be ordered to turn
7 over the funds under 11 U.S.C. § 542(a).

8 The court finds that this explanation of Debtor is unpersuasive. Even if Debtor
9 purportedly made a loan to Defendant, he still got and had the funds, which would have
10 been property of the bankruptcy estate upon loss of exempt status after the reinvestment
11 deadline. Thus, Defendant had possession, custody, or control of the homestead
12 proceeds irrespective of whether Debtor intended the funds to be loans or not. Thus, the
13 court finds that Plaintiff has established by a preponderance of the evidence that
14 Defendant had possession of the homestead proceeds of \$70,010 within the meaning of
15 11 U.S.C. § 542(a).

16 Defendant’s main defense to Plaintiff’s contention that he had possession of the
17 funds is that he used them to pay living and other expenses of both him and Debtor as he
18 asserted in his proposed findings of fact and conclusions of law: “She gave me money to
19 pay bills and I paid most of them in cash whenever possible. The house we are living in
20 was in horrible condition and was very small in size, about 1,800 square feet. It came
21 furnished and we had to buy a washer, dryer, a dishwasher and a stove and oven. We
22 had to spend several hundred dollars because sewage was flowing into the front lawn.
23 Not long ago we had no gas and the rusted old iron pipes had to be replaced for
24 \$3,200.00. We had no heat or warm water for about two weeks and were forced to rent a
25 place where we could take our showers. We paid as much as we could to Ronald Taxe
26 because he was responsible for convincing his wife to let us have a temporary place to
27 live.” *Defendant’s Proposed Findings of Fact and Conclusions of Law, Finding of Fact*
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1 No. 6, ECF 55. Defendant did not cite to any evidence being offered at trial to support his
2 version of the facts in this proposed finding of fact. He did not offer any documentary or
3 other evidence to support this version of the facts either. That is, Defendant provides no
4 specific factual details as to when these expenses were incurred, how they were
5 incurred, how much the expenses were, when the expenses were paid and how they
6 were paid with what funds, and there is no corroborating documentary or other evidence
7 to show that he used the money he got from Debtor, that is, the homestead proceeds
8 money from Checks 105, 107 and 108 to pay for these expenses. He says that he used
9 cash to pay these expenses, but he has no corroborating evidence to support his version
10 of the facts. As discussed above, Plaintiff produced sufficient evidence to establish a
11 prima facie evidentiary showing that Defendant had possession of the homestead
12 proceeds which were property of the bankruptcy estate after the 6 month reinvestment
13 period expired, and the court determines that Defendant had the burden to produce
14 evidence to rebut this prima facie showing. In saying this, the court does not shift the
15 ultimate burden of proving the turnover claim by a preponderance of the evidence from
16 Plaintiff to Defendant, as that ultimate burden of proof remains with Plaintiff. However,
17 due to lack of corroborative evidence, the court finds that Defendant has not shown that
18 he did not have possession of the homestead proceeds from Checks 105, 107, and 108
19 after the reinvestment period expired.

20 The court has also considered the additional budget estimate sheet titled "Other
21 Expenses" that Debtor and Defendant prepared, showing such other expenses totaling
22 \$49,900, which is part of Plaintiff's Trial Exhibit 11, *Monthly Living Expense List, Plaintiff's*
23 *Trial Exhibit 11 at 2*, which could conceivably show that any funds that Defendant got
24 from Debtor that may belong to the bankruptcy estate were spent. Debtor testified at trial
25 that these other expenses were incurred within the last two years (i.e., July 2014 to
26 February 2016), which could have been when the funds were property of the bankruptcy
27 estate. *Trial Transcript 42:2-25, 43:1-17*. The court finds that this exhibit does not help
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1 Defendant because he did not offer any documentary or other evidence to show how the
2 funds he got from Debtor were spent other than the conclusory and uncorroborated
3 testimony that he and Debtor gave at trial, which the court finds is not credible. That is,
4 as previously discussed, Defendant as to this list of other expenses provided no specific
5 information as to when these purported expenses were incurred and paid, such as
6 invoices, receipts or proofs of payment. Thus, the court finds that the testimony and
7 evidence offered by Defendant that the funds he got were used to pay other expenses
8 too unsubstantiated and lacking in credibility and does not rebut Plaintiff's prima facie
9 evidentiary showing that Defendant had possession of the homestead proceeds which
10 were property of the bankruptcy estate based on his receiving the funds from Checks
11 105, 107 and 108 which are subject to turnover to Plaintiff.

12 **CONCLUSION**

13 For the foregoing reasons, the court determines that Plaintiff has proven by a
14 preponderance the claim for turnover that Defendant was in possession of \$70,010 in
15 Debtor's homestead proceeds, which was and is property of the bankruptcy estate during
16 the pendency of this bankruptcy case and that Plaintiff is entitled to relief on her claim for
17 turnover and accounting under 11 U.S.C. § 542(a) against Defendant as to this amount.
18 Accordingly, the court will enter judgment in favor of Plaintiff and against Defendant
19 requiring Defendant to turn over, and account for, the amount of \$70,010 to Plaintiff
20 pursuant to 11 U.S.C. § 542(a).

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1 This memorandum decision constitutes the court's findings of fact and conclusions
2 of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52
3 of the Federal Rules of Civil Procedure. A separate judgment is being entered
4 concurrently.

5 IT IS SO ORDERED.

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23 Date: September 29, 2017

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Robert Kwan
United States Bankruptcy Judge